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was without fault. A custom existing at other places could have nothing to do with the rights of the appellant.

Judgment reversed with costs; cause remanded with directions to grant a new trial and for further proceedings.

Supreme Court of Vermont.

McDANIELS, EXECUTOR, &c., v. McDANIELS.

Conversations had with jurors about the case on trial by the friends of the prevailing party, intended and calculated to influence the verdict, constitute a sufficient cause to warrant the court in granting a new trial, even though not shown to have influenced the verdict in point of fact, and though they were had without the procurement or knowledge of the prevailing party, and listened to by the jurors without understanding that they were guilty of misconduct in so doing.

A motion for a new trial, upon the ground of misconduct by jurors during the trial, need not contain an averment that the misconduct was unknown to the moving party before the jury retired. It would seem to be otherwise when the objection to the juror is some matter which existed before the trial commenced, and which might have been a cause for challenge.

The fact that the moving party neglected to inform the court, before the jury retired, of misconduct on the part of jurors during the trial which came to his knowledge, would not, if proved, necessarily, as a matter of law, defeat the motion for a new trial, but would be one circumstance to be considered with others by the court in determining whether, in their discretion, to set aside the verdict.

APPEAL from the probate of an instrument purporting to be the last will and testament of James McDaniels, deceased. The case was tried by jury, at the September Term of the Rutland County Court, A. D. 1866, upon the issue joined upon the plea, that the instrument is not the last will and testament of the deceased, and a verdict was rendered for the proponent. After verdict, and before judgment, a motion was filed by the defendant to set aside the verdict for several causes, among which was the following: "For that some of the panel of jurors, after they were impanelled, and during the progress of the trial, and out of court, were talked to and with, upon the subject of said cause, and favorably to the proponent, by the agents, emissaries, and friends of Isaac McDaniels, and by them were urged and solicited, and influenced by improper conversations with said jurors, or in their presence, to render a verdict in favor of the propo-

ment." This motion was supported by accompanying affidavits. Further testimony was taken and filed by both parties, and at an adjourned session of the County Court, PECK, J., presiding, the verdict was set aside for the cause above assigned,—to which decision the proponent excepted. The exceptions were allowed, subject to the opinion of the Supreme Court whether exceptions will lie in such a case. The exceptions set forth that the court found that the conversations detailed in the affidavits were had with, and in the presence of the jurors who tried the cause, during the trial, and that several of the persons holding such conversations, were the friends of the proponent, and that they held such conversations for the purpose of influencing the verdict of the jury in his favor; that this was done without the procurement of either the proponent or the defendant, and without the knowledge of the proponent. And the court did not find that it was done with the knowledge of the defendant. It was also found that the conversations were of a character directly calculated to influence the verdict in favor of the proponent.

The court did not find any corruption, or intentional misconduct in any of the jurors, but did find that some of the jurors were guilty of impropriety in suffering conversations to be held with them, and in their presence and hearing.

The counsel for the proponent contended that the court could not legally set aside the verdict; and particularly because it was not set forth in the motion, nor in the affidavits sustaining the same, that the defendant had no knowledge of the conversations when they occurred, and before the jury retired to consider the verdict. But the court held this not to be in law essential.

E. Edgerton and Daniel Roberts, for the plaintiff.—1. As a general proposition, it may be said, that the setting aside of a verdict, and the granting of a new trial, rests in the discretion of the County Court, to which no exception lies. But this discretion is not unrestrained license. It is limited by legal principles and legal rules. It depends, both as to its exercise at all, and, in a degree, as to the mode of its exercise, upon the facts found. So far as the decision below can be resolved into a legal conclusion from the facts found and stated upon the record, it is subject to revision: *Joyal v. Barney*, 20 Vt. 159-160; *Briggs v. Georgia*, 15 Id. 61; *French v. Smith et al.*, 4 Id. 363.

2. The court reports, that the conversations referred to "were of a character directly calculated to influence the verdict in favor of the plaintiff," but does not find that the verdict was thus influenced; that there was no "corruption nor intentional misconduct in any of the jurors;" and that those conversations were had "without the procurement of the plaintiff, and without his knowledge." Courts will not visit the consequences of an irregularity upon an unoffending party, unless it appear that it has wrought some injury to the other party: *Dennison v. Powers*, 35 Vt. 39; *Downer v. Baxter*, 30 Id. 467; *Blaine v. Chambers*, 1 S. & R. 169; 2 Grah. & Wat. N. T. 309, 310, 312, 317; *Shea v. Lawrence*, 1 Allen 167.

3. This was not a proper case for the exercise of any discretionary action of the court, inasmuch as it must be assumed that the defendant knew of the matters complained of, at the time of their occurrence, and did not bring them to the knowledge of the court before the verdict, but lay quiet, speculating upon the chance of a verdict in his favor.

On this point the case states the non-finding of the court. "The court did not find that it was done with the knowledge of the defendant"—thus distinguishing between this and the positive finding in respect to the plaintiff's knowledge.

Clearly the tendency of the testimony was to prove this knowledge on the part of the defendant.

But to warrant setting aside the verdict, it should be both stated in the motion and be proved affirmatively, that the defendant did not know of the matter complained of before the rendition of the verdict: *Brunshill v. Giles*, 9 Bing. 13; *Herbert v. Shaw*, 11 Mod. 118; *State v. Camp*, 23 Vt. 551; *Jameson v. Androscoggin Railroad*, 52 Me. 412; *Pettibone v. Phelps et al.*, 13 Conn. 445; *Selleck v. Sugar Hollow T. Co.*, Id. 452; *Woodruff v. Richardson*, 20 Id. 237; 2 Grah. & Wat. N. Trials 303, 575.

Charles C. Dewey and *A. Potter*, for the defendant.—I. Exceptions will not lie, and the case should be remanded.

a. The court found the fact that the persons guilty of tampering were the friends of the proponent.

b. That the conversations were of a character directly calculated to influence the verdict of the jury in favor of the proponent.

c. That they were held for the purpose of influencing the verdict of the jury in his favor.

d. That the jurors were guilty of impropriety in suffering such conversations with them, and in their presence and hearing.

e. And that the conversations were in violation of law.

II. As a motion for a new trial, for causes *dehors* the record, is and must be addressed to the discretion of the court, the decision cannot be revised on exceptions, unless, indeed, it be for the improper admission or rejection of evidence, or when it is apparent the decision is based upon a false legal assumption: *Sheldon v. Perkins*, 37 Vt. 557; *Shea v. Lawrence*, 1 Allen 169; *White v. Wood*, 8 Cush. 415; 2 Gra. & Wat. 47, n. 4.

It has never been held, or even claimed, that jurors' depositions may not be received to prove the misconduct of the parties or of persons acting in their behalf: *Ritchie v. Halbrooke*, 7 S. & R. 458.

III. 1. It is not essential that the tampering be done by the party himself, nor by his procurement. It is sufficient if it be done by his friends and in his behalf: *Deacon v. Shreve*, 2 Zab. 176; *Coster v. Merest*, 3 Brod. & Bing. 272; *Knight v. Freeport*, 13 Mass. 218; *Shea v. Lawrence*, 1 Allen 169; *Brunson v. Graham*, 2 Yeates 166; Pleas of the Crown, vol. 2, p. 308; Gra. & Wat. vol. 2, p. 298, *et seq.*

2. And even if the attempt to bias the jury be made by strangers, the verdict will be set aside if there is fair ground for belief that it has been influenced thereby: Gra. & Wat. vol. 2, p. 309.

3. So, in the class of very numerous cases, where papers have been delivered to the jury by mere mistake, the verdicts have been set aside, whenever the papers had any tendency to bias them: *Whitney v. Whitman*, 5 Mass. 405; Vin. Abr., *Trial*, pl. 18; *Hix v. Drury*, 5 Pick. 296; *Sargent v. Roberts*, 1 Id. 337.

4. The same rule obtains, and verdicts will be set aside: 1. Where jurors are allowed to separate before a verdict is agreed upon, if the separation is attended with the slightest suspicion of abuse: *Oliver v. Trustees of Pres. Church*, 5 Cow. 283; *Horton v. Horton*, 2 Id. 589. 2. Where a juror gives private information to his fellows, material to the issue, which may have influenced them: *Sam v. The State*, 1 Tenn. 61. 3. Where jurors re-examine witnesses who have already testified: *Met-*

calf v. Dean, 2 Bay 94; *Perine v. Van Note*, 1 South. 146; *Bedington v. Southall*, 4 Price 232.

It thus appears from the authorities above cited, and many others to be found in the books, that the ground upon which courts set aside verdicts for improper attempts to influence the jury, is not merely and only the misconduct of the party, but the possibility that the unlawful attempt, by whomsoever made, or with whatever motive, may have inoculated the verdict with vice or error.

IV. 1. It is a corollary of the preceding proposition, already incidentally discussed, that it need not affirmatively appear that the verdict was injuriously affected by the tampering. If the purity of the verdict might have been affected, it will be set aside. And this rule has been adhered to with great rigor and tenacity: *Whitney v. Whitman*, 5 Mass. 405; *Cohen v. Robert*, 1 Strob. 410; *Perkins v. Knight*, 4 N. H. 474; *Hare v. The State*, 4 How. (Miss.) 187; *Com. v. Roby*, 12 Pick. 496; *Com. v. Wormley*, 8 Grat. 712; *Custer v. Merest*, 3 Brod. & Bing. 272; *Knight v. Freeport*, 13 Mass. 218; *Gra. & Wat.* vol. 2, p. 300; *Hix v. Drury*, 5 Pick. 286.

The opinion of the court was delivered by

STEELE, J.—The motion for a new trial was properly granted. It was not incumbent upon the moving party to show that the verdict was, in point of fact, influenced by the unlawful conversations. It is quite enough that, in a doubtful case, conversations with the jurors have been had during the progress of the trial for the purpose of influencing and directly calculated to influence them to render just the verdict they did. There is no practicable method to so analyze the mental operations of the jurors as to determine whether, in point of fact, the verdict would have been the same if the trial had been conducted, as both parties had a right to expect, according to law and upon the evidence in court. If the court, in their instructions to the jury, err, with respect to some proposition of law, it is well understood that the right of the defeated party, on exceptions to a new trial, does not depend on his showing that the error actually influenced the verdict. It is enough, if its natural tendency is to influence the jury to render their verdict against him, and such may reasonably have been its result. The right to a cor-

rect charge from the court is no more sacred or important than the right which, in this case, was violated. The analogy might be carried farther. It is not essential to the right to a new trial, on exceptions, that the error of the court should have been intentional, or by the fault of the prevailing party. So, in this case, the defendant was not any the less likely to be injured because the jurors did not appreciate the impropriety of tamely listening to conversations intended to influence them, or because the plaintiff was unaware of the officious efforts of his friends on his behalf. The friends of the plaintiff who thus approached the jury were guilty of a flagrant violation of the law, and the jurors who suffered themselves to be so approached, though they may have meant no wrong, were guilty, not only of a violation of the law, but also of the oath they had taken *to say nothing to any person about the business and matters in their charge but to their fellow-jurors, and to suffer no one to speak to them about the same but in court.* Both were liable to severe and summary punishment. The plaintiff, as he was unaware of these transactions, is not liable to punishment, but it does not follow from this that he can hold a verdict which is the result of a trial corrupted, though without his fault, by a shameful disregard of the familiar rules which are necessary to a decent administration of the law. The court set the verdict aside, not as a punishment to any one, but in justice to themselves, as well as to the defendant, that the trial may be conducted fairly so that the verdict, when finally rendered, may be entitled to the respect of both parties and the confidence of the court as the result of a trial substantially according to law, and upon the evidence in court. It is true that a verdict should not be set aside for every trifling error of law by the court, or for every trifling misconduct of a juror which occurs without the fault of the prevailing party, but it should be whenever the error or misconduct renders it reasonably doubtful whether the verdict has been legitimately procured.

The plaintiff insists that the motion is fatally defective because it contains no allegation that the defendant had not full knowledge of the matters complained of before the jury retired to consider their verdict, and that this is a defect which cannot be cured by proof, and that, even if it could, it has not been in this case, the court merely stating in the exceptions that they did not find that the misconduct occurred *with* the knowledge of the defendant,

and not stating that they did find that it occurred *without* his knowledge. We do not think these objections are well taken. It was not incumbent upon the moving party to either allege or prove that he had not such knowledge. If the other party could prove that he had, or if he could prove that he had not, it would be one fact to be considered, with others, by the court in determining whether, in their discretion, to grant the motion, but the circumstance that the moving party had such knowledge would not, as a matter of law, defeat the motion. The case is clearly and broadly distinguishable, both in reason and authority, from those in which the objection to the juror is some matter that existed before the trial. If an objection to a juror exists when the jury are impannelled, the juror may be challenged and another substituted, and if a party knowing the objection neglects to challenge, he thereby expresses his satisfaction with the juror. But where the objection arises from misconduct of the juror during the trial, the opportunity for challenge has passed. Another juror cannot then be substituted and a fair trial thereby secured. If the juror is dismissed it but results in what is asked for here—a new trial. A party ought usually to suggest to the court any serious misconduct of the jurors of which he has positive knowledge, or entirely reliable information, particularly if learned early in the trial, as it *may* result in an immediate discharge of the jury, and a saving of much time and expense. But the fact of the misconduct may be denied, and a court cannot always interrupt a trial to investigate charges against a juror, and must exercise very great caution and discretion to be able to even make inquiries of the jurors with relation to their conduct in such a manner as to create in their minds no feeling of resentment toward either party. We cannot hold that the failure of the party, if proved, to make the suggestion to the court would be more than a circumstance to be considered and weighed, with others, by the court in determining whether, in their discretion, to grant a new trial.

It is very true that in two Connecticut cases it has been held that it is necessary for the party to aver in his motion his ignorance, until after the jury retired, of the misconduct which occurred during the trial. But the latter of these two cases, *Woodruff v. Richardson*, 20 Conn. 241, professes to be governed by the earlier, *Pettibone v. Phelps*, 13 Conn. 452; and in *Petti-*

bone v. Phelps, the court, after stating several very good reasons why the motion should be denied, merely add, a point not made by counsel, that the motion is also insufficient for the reason that it contains no allegation that the misconduct of the juror was unknown to the plaintiffs before the trial closed, and that it was settled in *Selleck v. The Sugar Hollow Turnpike Co.*, 13 Conn. 453, that such an allegation was essential. It thus seems that this doctrine, in Connecticut, originally rests solely upon the authority of *Selleck v. The Sugar Hollow Turnpike Co.* Upon examination of that case, it turns out that the objection there taken was not at all misconduct by a juror during the trial, but was a disqualification which existed before the trial, in that the talesman was not an elector in Connecticut, but a citizen of New York; and the court hold that if the party knew the fact at the trial he might have challenged the juror provided he did not choose to waive the disqualification, and that he should have alleged that he did not know it in order to excuse his not making the objection seasonably and regularly. It is clear, therefore, that this case is no authority to warrant the decisions which professedly rest upon it.

The views which we have expressed are decisive of the matter before us, and it becomes unimportant to discuss the other questions presented. In the opinion of the court, this case presents a state of facts in which the court below, in the exercise of their discretion, not only might without error, but ought to have granted a new trial, and the exceptions to the action of the court in so doing are overruled and the cause is remanded.

Supreme Court of Tennessee.

SOLOMON McREYNOLDS v. THE STATE.¹

To constitute the crime of bigamy, there must be a valid marriage subsisting at the time of the second marriage.

A marriage between slaves was, in legal contemplation, absolutely void; but if the parties, after their manumission, continued to cohabit together as husband and wife, it was a legal assent and ratification of the marriage; and if while such marriage exists, one of the parties marries another, it is bigamy.

THE plaintiff in error, a free man of color, was indicted at the

¹ We are indebted to Hon. J. O. Shackelford, for this case.—EDS. AM. LAW REG.